No. 97-1283

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STUART HAYNSWORTH, *et al.*,

Petitioners,

—v.—

LLOYD'S OF LONDON, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT LLOYD'S IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondent Lloyd's, sued herein as Lloyd's of London, a/k/a The Corporation of Lloyd's, a/k/a Lloyd's, a/k/a The Society of Lloyd's, a/k/a The Committee of Lloyd's, is not a publicly held corporation, has no parent corporation, and has no subsidiaries that are not wholly owned.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Lloyd's respectfully submits this opposition to the petition for a writ of certiorari (the "Petition," cited herein as "Pet.") seeking review of a judgment of the United States Court of Appeals for the Fifth Circuit that requires Petitioners to adjudicate their claims against Lloyd's in the English courts, pursuant to English law, as they contractually committed to do.

STATEMENT OF THE CASE

The Petition presents two straightforward questions, each of which has already been definitively resolved by prior precedent of this Court. The first question is whether, as the Court of Appeals for the Fifth Circuit found, forum selection and choice of law clauses contained in international agreements between the Petitioners and Respondent Lloyd's (the "Choice Clause") are enforceable when claims under the federal or state securities laws, or other state statutes with "anti-waiver" provisions, are asserted in the U.S. courts. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), resolved this question in the affirmative, holding that the anti-waiver provisions of the federal securities laws do not bar enforcement of a forum agreement made in the context of a truly international transaction. Likewise, the anti-waiver provisions of the Texas securities and consumer fraud statutes do not bar enforcement of international forum selection agreements. The seven United States Courts of Appeals that have considered the enforceability of the Choice Clause—the Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits—have, following Scherk, unanimously held that the Choice Clause is enforceable as to both federal and/or state statutory claims.[1]

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[1] Richards v. Lloyd's of London, Nos. 95-55747, 95-56467, 1998 WL 39231 (9th Cir. Feb. 3, 1998) (en banc); Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996), mandamus denied, 117 S. Ct. 2497 (1997); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995);

Footnote continued

The second question is whether the Fifth Circuit applied the correct legal standard in finding that Petitioners had failed to demonstrate fraud going specifically to the Choice Clause itself, as opposed to fraud in the inducement of the underlying agreement.[2] This Court's decisions in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), Scherk, and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), clearly establish that the Fifth Circuit properly rejected Petitioners' assertion that generalized allegations of fraud in the inducement of the underlying agreements between them and Lloyd's are sufficient to invalidate the Choice Clause as the product of fraud.

Factual Background

Respondent Lloyd's is an English entity incorporated by, and granted regulatory powers pursuant to, Acts of the British Parliament. See Appendix for Petitioners ("Pet. App.") 108a. Specifically, pursuant to Lloyd's Act 1982, Lloyd's, through its governing body the Council of Lloyd's, is charged with the authority to regulate an English insurance market, and the participants in that market, who reside in approximately eighty nations. Lloyd's regulatory functions must be exercised in accordance with the Lloyd's Act 1982 and the Insurance Companies Act 1982, both English statutes. Lloyd's is further

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Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021 (1992).

[2] As Petitioners concede, all but three of them (Pet. 21 n.9) are collaterally estopped from relitigating this issue by their participation in Richards, in which the Ninth Circuit rejected the same allegations of fraud in the inducement of the Choice Clause. 1998 WL 39231 at *7-8.

subject to direct supervision by Her Majesty's Treasury.[3] Lloyd's is not an insurer, and does not underwrite or insure risks, accept premiums, or share in the profits or losses of those who underwrite risks in the Lloyd's market. Pet. App. 3a, 108a.

Petitioners are Texas residents who are underwriting members of Lloyd's, known as "Names." Names are individuals (and, since 1994, corporations) who each act as insurers in the Lloyd's market: they, and not Lloyd's, receive premiums from policyholders, and they, not Lloyd's, are directly liable to policyholders for the insurance risks they have underwritten. As required by English law, individual Names, such as Petitioners, are personally liable on the risks they insure to the full extent of their personal wealth. Pet. App. 3a-4a. However, under English law (Lloyd's Act 1982 § 8(1)), a Name's liability is several, not joint; a Name bears no responsibility for the underwriting obligations of other Names, and has no right to share in the underwriting profits of other Names. Pet. App. 3a-4a.

English statutes require that for an individual to underwrite insurance in the United Kingdom he must become a member of Lloyd's. Insurance Companies Act 1982 §§ 2(1)-(2). Lloyd's establishes regulatory requirements, financial and otherwise, that prospective Names must meet to qualify for underwriting membership in the Lloyd's market. Before admission to the market, Names must travel to London to meet with a representative of the Council of Lloyd's to acknowledge their awareness of the risks of underwriting, including the unlimited nature of their personal liability. Pet. App. 4a.

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[3] Lloyd's was subject to the supervision of the British Department of Trade and Industry until January 5, 1998, when these supervisory functions were transferred to the Treasury.

In order to become an underwriting member of the Lloyd's market, each Name—whether resident in the United States, England, or any of approximately eighty other countries—is required to enter into a simple two-page agreement with Lloyd's called the "General Undertaking." Pet. App. 4a. The General Undertaking of Petitioner Charles Robert Leslie is appended hereto in the Appendix for Respondents ("Resp. App.") R1. Each of the Petitioners has executed the General Undertaking. Pet. App. 4a. In so doing, Petitioners expressly agreed to comply with all English statutory requirements relating to their underwriting in the Lloyd's market and with all regulations promulgated by the Council of Lloyd's pursuant to the legislative and regulatory authority that Parliament granted to it. Resp. App. R2. Petitioners thus misstate the record when they assert that the General Undertaking consists of "nothing more than the [forum selection and choice of law] clause." Pet. 6.

Consistent with their agreement to subject themselves to English insurance statutes and Lloyd's regulatory authority, Petitioners, like all Names worldwide, agreed in the General Undertaking to adjudicate any disputes they might have relating to their membership of or underwriting in the Lloyd's market in English courts pursuant to English law. Specifically, paragraph 2.1 of the General Undertaking (Resp. App. R2) states:

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

Paragraph 2.2 (id.) states:

> Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of

> or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

Petitioners are wrong in their assertion that the Choice Clause contained in the 1986 General Undertaking was the first forum agreement between Names and Lloyd's. Pet. 6. As the Fifth Circuit correctly noted, even before the 1986 General Undertaking was required, Names had signed other forms of undertaking with Lloyd's requiring adjudication in England of disputes between Names and other Names, and between Names and their agents. Pet. App. 14a-15a. Petitioners do not point to any contradictory evidence.

Procedural History

The Leslie Case. Charles Robert Leslie commenced an action against Lloyd's on June 20, 1990. He asserted claims under section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), as well as pendent claims under Texas law for fraud, breach of fiduciary duty, and violations of the Consumer Protection Deceptive Trade Practices Act (the "DTPA"), Tex.

Bus. & Com. Code Ann. § 17.41 et seq. (West Supp. 1997).[4]

Lloyd's moved to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Choice Clause and the doctrine of forum non conveniens required Leslie to adjudicate his dispute with Lloyd's in the English courts, and for failure to state a claim upon which relief could be granted. Lloyd's also sought dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. By order dated September 4, 1991, the district court (Rainey, J.) affirmed, over Lloyd's objections, the recommendations of a Magistrate Judge that Lloyd's motion be denied in all respects. Lloyd's sought reconsideration of the district court's order.

After granting Lloyd's motion for reconsideration, the district court affirmed its original order. Pet. App. 28a-30a. The Leslie district court made clear that in deciding the dismissal motion it assumed the truth of Leslie's allegations. Pet. App. 35a nn.15-16.[5] Petitioners thus repeatedly misstate the record by referring to factual "findings" made by the Leslie court in declining to enforce the Choice Clause based on "evidentiary hearings." Pet. 3. When the district court affirmed denial of Lloyd's motion to dismiss, it also granted Lloyd's motion for leave to file an interlocutory appeal. On September 4, 1996, the

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[4] Leslie also named his Members' Agent, R.W. Sturge & Co., as a defendant but dismissed Sturge from the action "for reasons of litigation strategy." Pet. App. 30a n.2.

[5] The only "evidentiary hearing" (Pet. 3) held in Leslie occurred in connection with a preliminary injunction application made by Leslie while Lloyd's motion for reconsideration of its motion to dismiss was pending. Leslie sought an injunction that would have prevented Lloyd's from drawing upon a letter of credit that he arranged to be issued to Lloyd's to secure his underwriting obligations to insureds. The district court denied his request for an injunction, and the Fifth Circuit subsequently affirmed that denial. Pet. App. 93a.

Fifth Circuit certified for appeal the district court's order denying enforcement of the Choice Clause and denying dismissal based on grounds of forum non conveniens.[6] No other issues presented to the district court were certified for appeal.

The Haynsworth Case. On January 26, 1996, seventy-seven Names filed suit against Lloyd's in the United States District Court for the Southern District of Texas, alleging fraud, breach of fiduciary duty, and violations of the DTPA and the Texas Securities Act (Tex. Rev. Civ. Stat. Ann. art. 581-1 et seq. (West Supp. 1997)). Fifty-three of the Haynsworth plaintiffs had previously challenged enforcement of the Choice Clause unsuccessfully in other federal actions against Lloyd's. The Haynsworth plaintiffs did not assert federal securities law claims.

Lloyd's moved to dismiss the Haynsworth action on the grounds that the Choice Clause and the doctrine of forum non conveniens required plaintiffs to adjudicate their claims against Lloyd's in English courts in accordance with English law. Lloyd's also asserted that the Haynsworth plaintiffs who had already unsuccessfully challenged enforcement of the Choice Clause in prior suits against Lloyd's were estopped from relitigating that issue.

On July 15, 1996, the Haynsworth district court (Hughes, J.) held that the Choice Clause was enforceable, and thus dismissed the action. The district court specifically rejected Petitioners' contention that the Choice Clause had been procured by fraud and that enforcement of the Choice Clause would violate a strong public policy of Texas embodied in either the Texas

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[6] The Fifth Circuit had denied without prejudice Lloyd's first petition for leave to file an interlocutory appeal because the district court had not identified which of the issues it had decided were controlling questions of law apt for interlocutory appeal. The district court subsequently entered an amended order identifying the controlling issues of law certified for appeal.

securities laws or the DTPA.[7] Pet. App. 116a-118a. The district court alternatively held that the doctrine of forum non conveniens also required dismissal of the action. Id. at 119a-120a.

The Appeal. On April 15, 1997, the Fifth Circuit granted Lloyd's motion to consolidate the appeals in Leslie and Haynsworth.[8] On April 29, the court of appeals heard oral argument from the parties and from the Securities and Exchange Commission ("SEC"), which had obtained the court's permission to participate in the hearing as an amicus curiae, opposing enforcement of the Choice Clause. The SEC also submitted to the Fifth Circuit a copy of the amicus brief it had previously filed in a Ninth Circuit appeal from a California district court's decision enforcing the Choice Clause. Richards v. Lloyd's of London, No. 94-1211-IEG (POR), 1995 WL 465687 (S.D. Cal. May 1, 1995). Shortly before argument in this case, a divided Ninth Circuit panel had reversed in part the Richards district court, holding that the anti-waiver provisions of the federal securities laws barred enforcement of the Choice Clause simply because the federal securities laws were alleged to apply. Richards v. Lloyd's of London, 107 F.3d 1422 (9th Cir. 1997) ("Richards I"). The SEC, along with Petitioners, urged the Fifth Circuit to follow Richards I.[9] On February 3, 1998, an en banc panel of the Ninth

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7 The district court also held that those plaintiffs who had already litigated the enforceability of the Choice Clause in other actions were barred from doing so again. Pet. App. 118a.

8 Forty-three of the original appellants withdrew their appeal.

9 The SEC had previously filed its Richards amicus brief in the Allen case, in which the Fourth Circuit enforced the Choice Clause. Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996), mandamus denied, 117 S. Ct. 2497 (1997). The SEC opposed the grant of rehearing en banc in Richards, and argued before the en banc panel of the Ninth Circuit that reviewed, and ultimately withdrew, Richards I.

Circuit withdrew Richards I, and issued an opinion holding the Choice Clause to be enforceable. Nos. 95-55747, 95-56467, 1998 WL 39231 (9th Cir. Feb. 3, 1998) (en banc) ("Richards II").

Decision Below. On August 29, 1997, a unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Smith, Barksdale, & Benavides, JJ.) held that the Choice Clause was enforceable, thereby reversing the Leslie district court judgment and affirming the Haynsworth district court judgment. Finding the agreements at issue to be truly international, the Fifth Circuit held that this Court's decisions in Bremen and Scherk were controlling, and that the Petitioners had failed to meet their heavy burden of demonstrating that enforcement of the Choice Clause would be "unreasonable," as those decisions require. Pet. App. 10a.

Specifically, the Fifth Circuit held that Petitioners had failed to establish that enforcement of the Choice Clause would be contrary to the public policies embodied in the anti-waiver provisions of the federal and Texas securities laws, and the DTPA. Noting that this Court in Scherk had declined to reach or express any view as to whether the Exchange Act applied to plaintiff's claims in that case, the Fifth Circuit did not express any view as to the merits of Petitioners' claims, including whether any aspect of a Name's involvement in the Lloyd's market constitutes a "security" under either the federal or state securities laws, or a consumer transaction under the DTPA. Pet. App. 18a.[10] The Fifth Circuit concluded, based on Scherk, that neither the anti-waiver provisions of the federal or state securities laws,

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[10] Lloyd's vigorously disputes any contention that either the federal or state securities laws or the DTPA have any application to a Name's participation in the Lloyd's market, including the notion that any aspect of a Name's involvement in the Lloyd's market constitutes a security or a consumer transaction.

nor the anti-waiver provisions of the DTPA, constituted a bar to enforcement of the Choice Clause merely because claims under those statutes had been asserted. The Fifth Circuit recognized that any other conclusion would "'exalt[] the primacy of United States law over the laws of other countries,'" in direct contravention of Scherk and Bremen. Pet. App. 19a (quoting Scherk, 417 U.S. at 517 n.11).

The Fifth Circuit further concluded that, under Bremen and Scherk, an international forum agreement, such as the Choice Clause, cannot be circumvented simply because certain statutory remedies are unavailable in the chosen forum. Pet. App. 19a. In that regard, the Fifth Circuit noted the fairness of the English legal system and determined that the remedies available to Petitioners in England were "adequate to protect their interests and the policies behind the statutes at issue." Id. 25a.

The Fifth Circuit also held that Petitioners had not shown that they had been fraudulently induced into agreeing to litigate disputes with Lloyd's in England, under English law, as required by this Court in Scherk and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). The Fifth Circuit properly applied Scherk and Prima Paint to require Petitioners to demonstrate fraud going directly to the procurement of the Choice Clause in order to establish the unreasonableness of enforcing it, and determined that Petitioners had failed, as a matter of law, to do so. Pet. App. 12a-15a.[11]

Petitioners sought rehearing and/or rehearing en banc on September 11, 1997. On October 13, 1997, the Fifth Circuit

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[11] Because the Choice Clause was enforced, the Fifth Circuit found it unnecessary to address whether the action should also be dismissed pursuant to the doctrine of forum non conveniens, as the Haynsworth district court had held. Pet. App. 7a & n.7.

denied that request. Pet. App. 127a. On January 12, 1998, Petitioners submitted the Petition to this Court.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to grant review of the Fifth Circuit's decision. In enforcing the Choice Clause, the Fifth Circuit faithfully applied controlling precedent of this Court. Specifically, in Scherk, this Court rejected the very same contention advanced by Petitioner Leslie here: that a commitment contained in an international agreement to adjudicate claims relating to the agreement in a foreign tribunal may be vitiated simply by alleging that the federal securities laws apply to his claims. Scherk applies with equal—if not greater—force to the state law claims asserted by the Petitioners. The Fifth Circuit properly found that Scherk was controlling as to the contention that the enforcement of the Choice Clause was barred by the anti-waiver provisions of the federal and state statutes alleged to apply here.

Petitioners also contend that the Fifth Circuit's ruling was inconsistent with dictum in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). There is no such inconsistency. In these decisions, this Court enforced forum selection agreements in situations in which such agreements had previously been deemed unenforceable. Indeed, since Bremen, this Court has never declined to enforce a forum selection agreement made in the context of an international transaction.

Nor is there any split of authority between the circuits. The Fifth Circuit's decision is fully consistent with the decisions of the six other courts of appeals that have considered the enforceability of the Choice Clause. See supra note 1 (citing Choice Clause cases). Each of these courts explicitly rejected the contention that the anti-waiver provisions and/or general policies

of the federal and/or state securities laws permit Names to avoid their "solemn promise" to litigate in England (see Scherk, 417 U.S. at 519) simply by alleging that their participation in the Lloyd's market involved the sale of a security. These cases are indistinguishable from the case at bar.

Petitioners heavily rely on the Richards I opinion, holding the Choice Clause unenforceable as to federal securities law claims, in seeking review of the Fifth Circuit's ruling in this case, noting the "conflict" between Richards I and the ruling below. That conflict no longer exists. The Ninth Circuit en banc panel has since withdrawn Richards I and has held, as the Fifth Circuit did, that the Choice Clause is enforceable when the federal securities laws are alleged to apply. Richards II, 1998 WL 39231 at *1.

There is also no compelling basis for this Court to review the Fifth Circuit's rejection of Petitioners' claim that their assent to the Choice Clause was induced by fraud. Scherk and Prima Paint make clear that Petitioners' allegations of fraud are insufficient, as a matter of law, to invalidate the Choice Clause. The Fifth Circuit's decision in this regard is consistent with that of the four other courts of appeals that have addressed, and rejected, identical allegations of fraud in the procurement of the Choice Clause. Richards II, 1998 WL 39231 at *7-8; Tufts v. Corporation of Lloyd's, 128 F.3d 793 (2d Cir. 1997), aff'g per curiam 981 F. Supp. 808, 813-14 (S.D.N.Y. 1996); Bonny, 3 F.3d at 159-60; Riley, 969 F.2d at 960.

This Court has declined—in Riley, Roby, Bonny, and Allen—to review decisions enforcing the Choice Clause each of the four times such review was sought. It should do so again.

I. THE FIFTH CIRCUIT PROPERLY HELD THAT THE CHOICE CLAUSE COULD NOT BE AVOIDED MERELY BY ALLEGING CLAIMS UNDER STATUTES WITH ANTI-WAIVER PROVISIONS

The Fifth Circuit properly recognized that "the basic framework" for analyzing whether the Choice Clause is enforceable is "the strong presumption of enforceability established by Bremen and Scherk." Pet. App. 18a. In M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), this Court firmly established that forum selection clauses contained in international agreements are entitled to a strong presumption of enforceability. Accordingly, such clauses must be "specifically [enforced] unless the party resisting enforcement could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Id. at 15. Just two years after Bremen was decided, this Court in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), held that the principles set forth in Bremen also governed the enforceability of a "truly international" forum agreement when the plaintiff alleges that the federal securities laws apply to the dispute. Id. at 509, 514-15.

The strong presumption of enforceability derives not only from a general respect for contract but from the specific needs of international commerce. As the Court stated in Bremen:

> We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

407 U.S. at 9. Likewise in Scherk, the Court recognized that

> [a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost

> indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516.

The presumption of enforceability accorded to an international forum agreement is even stronger in this case than in an ordinary commercial agreement. By executing the General Undertaking, Petitioners agreed to abide by English statutes, and by rules and regulations promulgated by Lloyd's, as regards their underwriting business in an English insurance market. The Choice Clause is therefore critical to Lloyd's ability to regulate the marketplace—which includes Names from approximately eighty different countries—effectively and consistently. As an English court has ruled:

> The clear and simple purpose of this agreement, aptly called an undertaking, was to ensure that on his becoming a Name [defendant] became subject to the regulatory regime of Lloyd's. The clauses governing choice of law and venue were ancillary to that object.

Society of Lloyd's v. Clementson, [1995] LRLR 307 (C.A. Nov. 10, 1994) (LEXIS, Enggen Library, Cases File).

Claims by Names arising out of their underwriting or membership in Lloyd's "'aim[] at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation.'" Pet. App. 5a-6a (quoting Hirsch v. Oakeley Vaughan Underwriting Ltd., No. 89-2563, slip op. at 7 (5th Cir. May 31, 1990)). It would be completely anomalous to allow U.S. courts under U.S. law to adjudicate disputes between U.S. Names and Lloyd's when the regulatory relationship at the heart of the dispute was created by, and is governed by, English law. Such a result would ultimately lead to Names, solely by

vagary of residence, having different rights and obligations to policyholders and Lloyd's.

A. The Fifth Circuit Properly Applied Scherk to the Federal Securities Claim

Petitioner Leslie's claim that section 29(a) of the Exchange Act, i.e., the "anti-waiver" provision, makes the Bremen presumption of enforceability inapplicable was precisely the question considered and answered in Scherk.[12] Specifically, this Court in Scherk rejected the argument that section 29(a) precluded dismissal of claims asserted under section 10(b) of the Exchange Act in favor of the contractually chosen forum in Paris. 417 U.S. at 509, 514-15. As the Fifth Circuit properly recognized, Scherk is "directly on point." Pet. App. 24a. See also Richards II, 1998 WL 39231 at *5 ("We follow our six sister circuits that ruled to enforce the choice clause . . . because we apply Scherk.").

None of Leslie's attempts to distinguish Scherk has any merit.

1. The Choice Clause Is a Truly International Agreement

Leslie tries to avoid application of Scherk by arguing that his relationship with Lloyd's does not involve "the type of 'international business transaction' contemplated in Scherk." Pet. 16. The Fifth Circuit aptly noted that "[t]he most charitable adjective with which to describe [this] argument is 'disingenuous,'" because it is

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12 Of the 28 Petitioners, only Leslie has alleged violations of the Exchange Act, despite the Petition's repeated references to "Petitioners' substantive Exchange Act rights." See, e.g., Pet. 11.

> sufficiently obvious that an agreement is "international" when it involves an American Name's underwriting international insurance policies in an English market pooling resources with other Names from over eighty countries and all the while explicitly agreeing to be bound by English law.

Pet. App. 20a. See also Richards II, 1998 WL 39231 at *4 ("Entering into the Lloyd's market . . . is plainly an international transaction."); Bonny, 3 F.3d at 159 n.9 ("There is no question that the transaction involved here is truly international."); Roby, 996 F.2d at 1362-63; Riley, 969 F.2d at 957 ("[The] agreement is truly international").

Leslie's attempt to obscure the international nature of his agreements with Lloyd's by focusing only on alleged U.S. conduct is futile. Pet. 16-18. In Bremen, this Court reversed an appellate decision holding that a forum selection agreement requiring litigation in England should not be enforced because U.S. contacts predominated over any English contacts. 407 U.S. at 7-8. The facts underlying Scherk likewise demonstrate that the relevant inquiry is not which country has the most contacts, but whether the transaction "touches two or more countries, each with its own set of substantive laws and conflicts of laws rules." 417 U.S. at 516.[13]

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[13] In Scherk, the plaintiff was an American company and the principal negotiations occurred in the United States, but both the defendant, and the businesses sold to the plaintiff in the disputed transaction, were Europe-based. Alberto-Culver Co. v. Scherk, 484 F.2d 611, 613-14 (7th Cir. 1973), rev'd, 417 U.S. 506 (1974).

2. The Choice Clause Is Enforceable Without Determining or Assuming That the Transactions at Issue Are Subject to the Federal Securities Laws

Leslie also attempts to distinguish Scherk by erroneously asserting that this Court's holding in that case was premised on its conclusion that the federal securities laws would be applied by the arbitrators in Paris. Pet. 13. Based on this misreading of Scherk, Leslie argues that the Fifth Circuit was required either to assume the truth of his allegation that the federal securities laws applied to his participation in the Lloyd's market or to give dispositive weight to the Leslie district court's ruling that his complaint stated a claim under the Exchange Act. Pet. 10-11. The Fifth Circuit, relying on Scherk, properly rejected this contention.[14]

In enforcing the international forum agreement in Scherk, this Court did "not reach, or imply any opinion as to, the question whether the acquisition of Scherk's business was a security transaction." 417 U.S. 506, 514 n.8 (1974). In so holding, this Court rejected the reasoning of the Seventh Circuit, which had held that the question of enforceability "turns on whether the transaction here in issue involves 'securities' within the purview of section 10(b). . . ." Alberto-Culver, 484 F.2d at 615. After concluding that securities were involved, the Seventh Circuit found Bremen inapplicable and instead found Wilko v. Swan, 346 U.S. 427 (1953)—which had barred enforcement of an arbitration

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[14] The Haynsworth district court, like this Court in Scherk, did not decide or assume the merits of Petitioners' claim that the Texas securities and consumer fraud statutes have any application here. Pet. App. 111a-114a (describing, but not passing judgment upon, plaintiffs' various purported claims). The Leslie district court's interlocutory ruling on the motion to dismiss for failure to state a claim under the Exchange Act—even if it were relevant, which it is not—does not apply to any Petitioner other than Leslie.

clause in a domestic securities case—to be dispositive. Alberto-Culver, 484 F.2d at 615.

Reversing, this Court found that the international nature of the agreement in Scherk "involve[d] considerations and policies significantly different than those found controlling in Wilko." 417 U.S. at 515. In particular, the Court noted that:

> In Wilko . . . there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. . . . In this case, by contrast . . . in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.

Id. at 515-16.[15] It was precisely because the transaction in Scherk "touch[ed] two or more countries" that the Court declined to decide or assume whether the federal securities laws applied to the transaction at issue. Id. at 516. Consequently, under Scherk, the anti-waiver provisions of the federal securities laws (or any other statute) may not be given dispositive weight in determining the enforceability of an international forum clause.

Leslie also contends that Shearson/American Express v. McMahon, 482 U.S. 220 (1987), bars enforcement of a forum selection clause if the chosen forum will not apply the federal securities laws to the dispute. Pet. 13-14. According to Petitioners, McMahon allows "procedural rights" to a judicial forum to be waived only when it is certain that the "substantive

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[15] Wilko has since been overruled. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989).

rights" purportedly guaranteed by the securities laws will be applied in the designated forum. Id. at 12-15. McMahon, however, did not involve an international agreement but rather a purely domestic transaction to which the federal securities laws indisputably applied. McMahon, 482 U.S. at 228-29. Consequently, McMahon provides no support for the argument that international forum clauses may only be enforced when the chosen forum is certain to apply American statutory rights, for the simple reason that this question—which had already been answered in the negative by Scherk—was not before the McMahon Court.[16]

Petitioners' reliance on dicta in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), is equally misplaced. Mitsubishi enforced an international arbitration clause in a case involving anti-trust counterclaims, overruling a line of lower court decisions holding anti-trust claims to be non-arbitrable. Id. at 640. The parties had agreed that, despite a provision requiring the Japanese arbitrators to apply Swiss law, the anti-trust counterclaims would also be submitted for arbitration. The following footnote was therefore pure dictum:

> [I]n the event the choice of forum and choice of law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for anti-trust violations we would have

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16 Petitioners cite language in McMahon that they claim limits Scherk to cases in which a plaintiff's rights under the federal securities laws will be enforced in the chosen forum. Pet. 13 (citing McMahon, 482 U.S. at 229). Scherk itself is inconsistent with this contention. In Scherk, a choice of law clause requiring the Parisian arbitrators to apply Illinois law to any disputes (417 U.S. at 508) did not assure that the arbitrators would apply the federal securities laws, or even consider the Exchange Act claims, as the dissent pointedly noted. Id. at 532-33 & n.11 (Douglas, J., dissenting).

> little hesitation in condemning the agreement as against public policy.

Id. at 637 n.19.[17] The Fifth Circuit properly recognized that this dictum "is limited to the antitrust context" even if read broadly. Pet. App. 22a. Like the Fifth Circuit, the other courts of appeal that have considered whether the Mitsubishi dictum precludes enforcement of the Choice Clause have held that it does not. Richards II, 1998 WL 39231 at *6; Bonny, 3 F.3d at 160; Shell, 55 F.3d at 1230-31; Roby, 996 F.2d at 1364-65; Riley, 969 F.2d at 959-60. Petitioners' attempt to apply the Mitsubishi dictum to the Choice Clause flies in the face of Scherk, in which this Court recognized, in the context of the claimed application of the anti-waiver provisions of the federal securities laws, that

> [a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516 (emphasis supplied).[18]

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17 The cases cited in the Mitsubishi footnote to support the "prospective waiver" dictum do not involve forum selection or choice of law clauses but instead involve general releases of any future claims. See, e.g., Reidel's Inc. v. General Elec. Co., 498 F.2d 95 (5th Cir. 1974). By executing the Choice Clause, however, Petitioners have not released any claims and have not been left without remedies for alleged fraud. See infra § I.C, at p. 23.

18 Petitioners also rely on dictum in Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), to support their contention that the Choice Clause constitutes an impermissible waiver of statutory rights. Pet. 7-9. This reliance is misplaced. In Vimar, this Court overruled a long line of lower court precedents that had voided forum agreements under the Carriage of Goods by Sea Act

Footnote continued

Petitioners' argument is equally inconsistent with Bremen. In Bremen, the contract at issue did not contain an express choice of law provision, but this Court recognized that the choice of an English forum was essentially a choice of English law as well. 407 U.S. at 13 n.15. The Court thus found that it was "reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law." Id. Although the Court explicitly recognized that application of English law would be outcome determinative and yield results different from those that would obtain under U.S. law (id. at 8 & n.8), it nonetheless enforced the forum agreement.

In short, United States public policy does not preclude parties to an international transaction from resolving in advance any uncertainty as to potential conflicts of law in favor of application of foreign law. As the Fifth Circuit aptly noted:

> It defies reason to suggest that a plaintiff may circumvent forum selection . . . clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff would simply have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We

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("COGSA"), and enforced forum selection and choice of law provisions requiring adjudication in Japan. Because COGSA is an implementation of an international treaty intended to create uniform rights and obligations amongst the signatory nations, Vimar neither displaces nor modifies Bremen or Scherk. As the Fifth Circuit recognized, "COGSA, unlike the American securities statutes or the Texas laws . . . [embodies] an international scheme the very nature of which would be frustrated by permitting parties to opt out of it." Pet. App. 23a.

> refuse to allow a party's solemn promise to be defeated by artful pleading.

Pet. App. 24a-25a (quoting Roby, 996 F.2d at 1360); see also Richards II, 1998 WL 39231 at *4 (same).

B. The Fifth Circuit Properly Applied Scherk to the State Statutory Claims

As noted above, the Fifth Circuit also properly rejected Petitioners' claims that the "anti-waiver" provisions of the Texas "Blue Sky" statute and the DTPA authorized them to litigate in Texas in violation of their solemn agreement to litigate exclusively in England. The Fifth Circuit correctly held that the principles set forth in Bremen and Scherk apply in diversity actions in which the plaintiffs assert claims under state statutes. Pet. App. 8a-9a. Consequently, Scherk controls the enforceability of the Choice Clause as to the Petitioners' Texas statutory claims. Indeed, this Court's decision in Scherk applies with even greater force to the Texas statutory provisions Petitioners invoke. See Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1358 (6th Cir. 1992) ("When weighed against the concerns of international comity, the public policies of a state deserve less weight than the public policies of the nation."); Shell, 55 F.3d at 1231 (holding that plaintiffs had not proved that the public policy underlying Ohio securities laws outweighed the policy behind "supporting the integrity of international agreements" like the Choice Clause).[19]

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[19] While Petitioners argue that the "Texas courts have consistently upheld the legislature's edict" by enforcing the anti-waiver provisions (Pet. 10), that assertion is both irrelevant in a diversity case and wrong as a matter of Texas law. The Texas courts have squarely held that "[c]ontractually selecting a forum for future litigation is not an impermissible waiver of rights under the DTPA . . . ." Accelerated Christian Educ., Inc. v. Oracle Corp., 925 S.W.2d 66, 74 (Tex. App. 1996, no writ) (emphasis supplied). The Texas federal courts have reached the same conclusion in cases

Footnote continued

Furthermore, all but three of the Petitioners are barred by collateral estoppel from challenging the enforceability of the Choice Clause as to their Texas Blue Sky claims because they previously raised state securities law claims in the Richards litigation that were dismissed on the basis of the Choice Clause. Pet. 21 n.9. Although the Fifth Circuit found it unnecessary to address the collateral estoppel issue in light of its ruling on the Choice Clause (Pet. App. 7a n.7, 119a-123a), collateral estoppel provides an independent basis for dismissal of most of Petitioners' claims. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

C. Petitioners Have Adequate Remedies for Their Claims in the English Courts

The Fifth Circuit correctly determined that the "remedies in England are adequate to protect [Petitioners'] interests and the policies behind the statutes at issue." Pet. App. 25a. The six other appellate courts that have enforced the Choice Clause reached the same conclusion, recognizing that Names have significant remedies against Lloyd's for fraud in the English courts.[20] Richards II, 1998 WL 39231 at *7; Allen, 94 F.3d at

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involving DTPA claims. Hoffman v. Burroughs Corp., 571 F. Supp. 545 (N.D. Tex. 1982); Wydel Assocs. v. Thermasol, Ltd., 452 F. Supp. 739 (W.D. Tex. 1979). Petitioners conspicuously fail to cite any of these cases, and the Texas cases they do cite (Pet. 9-10) have absolutely nothing to do with the enforcement of forum selection agreements.

20 Petitioners misstate Lloyd's amenability to suit in England under English law. Pet. 5. Lloyd's has no immunity under English law from claims that it acted "in bad faith." Lloyd's Act 1982 §14; Richards II, 1998 WL 39231 at *7. Names may also sue their Members' and Managing Agents for breach of fiduciary duty and negligence. Richards II, 1998 WL 39231 at *7 & n.6.

929; Shell, 55 F.3d at 1231; Bonny, 3 F.3d at 161; Roby, 996 F.2d at 1365-66; Riley, 969 F.2d at 958.

The Fifth Circuit properly rejected the contention that any specific differences between the remedies available to Names in England and the remedies that the federal securities statutes might provide prevent enforcement of the Choice Clause:

> We refuse to accept the notion . . . that the sheer scope of U.S. securities law automatically renders that of other countries inferior or should provide American investors a means to escape their contractual obligations when they begin to prove too costly.

Pet. App. 24a. Any other conclusion would be inconsistent with both Bremen and with Scherk, as it would "reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . .'" Scherk, 417 U.S. at 519 (citing Bremen, 407 U.S. at 9).

II. THE FIFTH CIRCUIT PROPERLY HELD THAT THE CHOICE CLAUSE WAS NOT PROCURED BY FRAUD

Three of the Petitioners also attack the Choice Clause as the product of fraud. See supra note 2. In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), and Scherk, this Court held that forum agreements are unenforceable on grounds of "fraud and overreaching" only "if the inclusion of that clause in the contract was the product of fraud or coercion." Scherk, 417 U.S. at 519 n.14 (emphasis in original) (citing Prima Paint, 388 U.S. at 404 & n.11). As this Court recognized in Scherk, the exception set forth in Bremen to enforcement of forum agreements for fraud or overreaching "does not mean that anytime a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable." Scherk, 417 U.S. at 519 n.14.

The Fifth Circuit properly applied Prima Paint and Scherk in rejecting Petitioners' generalized allegations of fraud as grounds to invalidate the Choice Clause. Pet. App. 11a-17a. Like the Fifth Circuit, the Second, Ninth, and Tenth Circuits have rejected, based on Prima Paint and Scherk, identical claims of fraud in the inducement of the Choice Clause. See Richards II, 1998 WL 39231 at *7-8; Tufts v. Corporation of Lloyd's, 128 F.3d 793 (2d Cir. 1997), aff'g per curiam 981 F. Supp. 808, 813 (S.D.N.Y. 1996); Riley, 969 F.2d at 960. Cf. Bonny, 3 F.3d at 160 n.10.

A. The Fifth Circuit Properly Applied Prima Paint

Petitioners contend that the Fifth Circuit erred in applying Prima Paint to this case because Prima Paint applies only to arbitration clauses governed by the Federal Arbitration Act ("FAA"), not to judicial forum selection agreements like the Choice Clause. Pet. 22. This argument is specious because, as Prima Paint itself makes clear, the FAA makes arbitration agreements as enforceable as—but no more enforceable than—other contractual provisions, including judicial forum selection agreements. 388 U.S. at 404 n.12 (citing 9 U.S.C. § 2). In Scherk, this Court extended to arbitration clauses the Bremen criteria for assessing the enforceability of judicial forum agreements, holding that arbitration clauses are simply "a specialized kind of forum-selection clause." Scherk, 417 U.S. at 519 & n.14. See also Vimar, 515 U.S. at 534 ("[F]oreign arbitration clauses are but a subset of foreign forum selection clauses in general."). The appellate courts have uniformly held that Prima Paint's specificity requirement applies to agreements to litigate in judicial as well as arbitral fora. See, e.g., Richards II, 1998 WL 39231 at *8; Riley, 969 F.2d at 960.

Petitioners further suggest that Prima Paint should not apply to judicial forum clauses because courts do not retain jurisdiction, as they do in the arbitral context, to ensure that the fraud claims have been properly addressed. Pet. 22. While it is true that a court may have an opportunity to review an arbitral

award prior to its confirmation, a court's ability to vacate the award is limited by the FAA to narrowly prescribed instances, such as when the award itself was procured by fraud, when there is evident partiality or misconduct by the arbitrators, or when the arbitrators refused to hear material evidence. 9 U.S.C. § 10. This narrow scope of review does not permit de novo review of the merits of the arbitrator's award or of any finding concerning a claim of fraud in the inducement of the contract. Pet. 22.

B. The Fifth Circuit's Application of Prima Paint Is Consistent with Moseley

Contrary to Petitioners' contention, the Fifth Circuit's application of Prima Paint is fully consistent with this Court's earlier decision in Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167 (1963). Moseley does not hold that generalized assertions that a forum selection agreement was part of a broader fraud concerning the underlying contract suffice to invalidate the forum agreement. Rather, in Moseley, in which Petitioners had alleged that both the arbitration agreement and the underlying agreement had been procured by fraud, the Court simply held that the allegations relating to the arbitration agreement should be determined by the district court in advance of an assessment of any other issues in that case. Id. at 171.[21] Thus, Prima Paint's rule that a court may only assess whether the making of the forum agreement was fraudulent is entirely consistent with this Court's decision in Moseley, and this Court in Prima Paint so recognized. Prima Paint, 388 U.S. at 404 n.12. See also Richards II, 1998 WL 39231 at *8 (rejecting interpretation of Moseley that Petitioners advance here); Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 668 (2d Cir. 1997) (holding that, under Prima Paint and Moseley,

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[21] Notably, in Moseley, no party had sought to enforce the arbitration clause, and the Court was not ruling on the merits of the allegations of fraud in the inducement. 374 U.S. at 168.

a party seeking to avoid a forum selection clause must prove "some nexus between the alleged fraud or misrepresentation and the arbitration clause in particular" which may not be established by simply alleging that the "clause was a part of the overall scheme to defraud.").[22]

Unlike the district court in Moseley, the Fifth Circuit has already found that, as a matter of law, Petitioners made no allegations of fraud directed to the Choice Clause. Pet. App. 12a-16a. It specifically rejected the contention that Lloyd's alleged characterization of the 1986 General Undertaking as containing "few variations of substance" from prior agreements signed by Names (Pet. 6-7) was a fraudulent misrepresentation specific to the Choice Clause.[23] Pet. App. 14a-15a. Likewise, the Fifth Circuit rejected Petitioners' claim that Lloyd's alleged failure to affirmatively explain the legal import of the Choice Clause establishes fraud specific to the Choice Clause:

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22 Petitioners contend that C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette, 912 F.2d 1563 (6th Cir. 1990), is inconsistent with the Fifth Circuit's ruling and creates a split of appellate authority as to the proper application of Prima Paint. Pet. 23. Petitioners are wrong. C.B.S. is consistent both with Prima Paint's specificity requirement and with the decisions of other appellate courts interpreting that requirement. The Sixth Circuit in C.B.S. merely held that when "the plaintiff affirmatively pleads that the contract and the arbitration agreement included therein were procured through fraud, the court should determine whether the arbitration clause was used to further the fraudulent scheme." 912 F.2d at 1568. The Sixth Circuit thus remanded the case to the district court for a determination as to whether plaintiffs could substantiate any claims of fraud specific to the arbitration clause. The Sixth Circuit did not hold that allegations that a forum clause was part of a fraudulent scheme sufficed, by themselves, to invalidate the clause.

23 Moreover, as both the Leslie district court and the Fifth Circuit noted, this statement was allegedly made by Petitioners' Members' Agent, not by Lloyd's. Pet. App. 14a n.14.

> [t]he plaintiffs were sophisticated parties contracting voluntarily; it is not for us to impose a duty upon one party to counsel the other as to the risks and benefits of a contract. . . . The duty was the plaintiffs' to read the plain terms of the agreement, not Lloyd's to lecture them about it.

Pet. App. 15a. See also Tufts v. Corporation of Lloyd's, 981 F. Supp. at 813 (S.D.N.Y. 1996) ("Lloyd's was not in a fiduciary relationship with Plaintiffs and had no duty to explain the effect of the choice clauses to them."), aff'd per curiam, 128 F.3d 793 (2d Cir. 1997); Bonny, 3 F.3d at 156 n.10 ("Nothing excuses the plaintiffs for not being aware of the substantive provisions of English law that the forum selection clause incorporates into their agreement").

The Fifth Circuit also rejected the claim that the 1986 General Undertaking was a "take-it-or-leave-it" offer that renders the Choice Clause the product of "overreaching." Pet. 21. Like Petitioners' claims of fraudulent inducement, the facts relied upon to support their allegations of overreaching are in no way specific to the Choice Clause, but relate to the circumstances surrounding the contract as a whole, as the Fifth Circuit properly found. Pet. App. 16a. Even if these allegations were directed specifically at the Choice Clause, the Fifth Circuit properly recognized that Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), in which this Court enforced a forum selection clause contained in an agreement that had not been subject to negotiation, would nevertheless require it to reject Petitioners' claim of overreaching. Id.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

Dated: March 9, 1998

Respectfully submitted,

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APPENDIX

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[SEAL]

GENERAL UNDERTAKING

This Undertaking is made the _____ day of _____, 19__ between:

(1) The Society of Lloyd's incorporated by Lloyd's Act 1871 ("Lloyd's" (which expression shall include any officer or employee of Lloyd's, any person in or to whom whether individually or collectively any powers or functions are vested or delegated by or pursuant to Lloyd's Acts 1871-1982)) and

(2) Charles Robert Leslie (the "Member") on behalf of himself and his legal and personal representatives and successors.

WHEREAS:

(A) The Lloyd's Acts 1871-1982 conferred powers on the Council of Lloyd's (the "Council") to make byelaws for the purposes provided in such Acts.

(B) Pursuant thereto the Council duly made the Membership Byelaw (No. 9 of 1984) on 12th November, 1984 (the "Byelaw") prescribing inter alia requirements to be satisfied or complied with as a continuing condition of membership of, and of underwriting insurance business at, Lloyd's.

(C) The Member is or, as the case may be, is to become a member of Lloyd's.

(D) Pursuant to the provisions of the Byelaw and in consideration of the Member's admission to membership of, and/or of underwriting insurance business at, Lloyd's or, as the case may be, continuing membership of, and/or of underwriting insurance at, Lloyd's, the Member and Lloyd's consider that it is in their respective interests to become parties to this Undertaking.

NOW THEREFORE IT IS AGREED as follows:

1. Throughout the period of his membership of Lloyd's the Member shall comply with the provisions of Lloyd's Acts 1871-1982, any subordinate legislation made or to be made thereunder and any direction given or provision or requirement made or imposed by the Council or any person(s) or body acting on its behalf pursuant to such legislative authority and shall become a party to, and perform and observe all the terms and provisions of, any agreements or other instruments as may be prescribed and notified to the Member or his underwriting agent by or under the authority of the Council.

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of any dispute and/or controversy of whatsoever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a Member of, or to underwrite insurance business at, Lloyd's.

3. If any term of this Undertaking shall to any extent be invalid or unenforceable, the remainder of the Undertaking shall not be affected thereby and each term of this Undertaking shall be valid and be enforceable to the fullest extent permitted by law and a substitute provision shall be negotiated by the parties hereto to preserve as nearly as possible the original intent of this Undertaking.

IN WITNESS whereby the parties hereto have caused this Undertaking to be duly executed on the date first written above.

SOCIETY OF LLOYD'S

By:

Authorised Signatory [SEAL]

By:

Member's Signature

/s/ CHARLES ROBERT LESLIE